

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ awarded claimant 46.72 weeks of permanent partial disability compensation for a 25 percent scheduled injury to the left forearm. Neither party disputes that finding. The issues raised for the Board's review are:

1. What was claimant's average weekly wage?
2. Is claimant entitled to temporary total disability benefits in addition to those the ALJ awarded?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board adopts the findings, conclusions and orders of the ALJ as its own as if specifically set forth herein, except as clarified as follows:

Respondent school district employed claimant as a substitute teacher on the day he fell and suffered a compensable injury. Claimant did not have an employment contract with respondent or a set schedule. Instead, he merely filled in for full-time teachers if they needed or wanted time off work. When claimant worked, respondent paid him \$15 for up to two hours worked per day, \$30 for two to four hours worked per day, and \$60 for four to eight hours worked per day.¹ From January 25, 1999, to the date of accident, March 10, 1999, claimant only worked on six (6) days in four separate weeks and earned \$270.00.² Based on this evidence, the ALJ determined that claimant was a part-time employee and calculated his average weekly wage accordingly.

Under K.S.A. 44-511, the term "part-time hourly employee" means an employee paid on an hourly basis, regularly expected to work less than 40 hours per week, and working in a type of employment where there is no customary number of hours constituting an ordinary work day. Claimant unpersuasively argues that the ALJ erred in calculating his average weekly wage based on the statutory formula designated for part-time employees paid hourly wages. He contends that the ALJ erred because he was not paid a "fixed hourly rate" but rather on the basis of "the portion of the day he worked."³ In the alternative, claimant contends that the ALJ erred because "[w]orking a total of five (5) days

¹ Doll Depo., at 9.

² Doll Depo., Ex. 8.

³ Claimant's Brief at 5-6.

for respondent from January 25, 1999 through the date of accident” does not constitute working less than 40 hours a week on a “regular basis.”⁴

Although claimant did not receive an hourly wage per se, the record supports that his compensation was nevertheless directly related to the number of hours he worked for respondent. Moreover, during the 26 weeks immediately preceding the March 10, 1999, date of accident, claimant only worked on six (6) days in four separate weeks. So contrary to claimant’s argument, claimant’s work history demonstrates conclusively that respondent did not possess a customary number of hours constituting an ordinary work day or work week for claimant’s employment. The Board examined the methods of payment set forth in K.S.A. 44-511 and finds that claimant’s method of compensation more closely approximates compensation based on a fixed hourly rate than any other compensation scheme in the statute. Accordingly, the Board finds that the ALJ did not err in calculating claimant’s average weekly wage based on the statutory formula designated for part-time employees.

Claimant further argues that the ALJ erred when he failed to award temporary total disability benefits through the date his physician determined he reached maximum medical improvement. According to K.S.A. 44-510c, temporary total disability exists when an injured employee, on account of a work-related injury, is completely and temporarily incapable of engaging in any type of substantial and gainful employment. In this regard, claimant did not present expert medical testimony supporting that he was unable to engage in substantial gainful employment during the time frame alleged, and claimant’s own testimony does not support claimant’s entitlement to additional temporary total disability benefits. As a result, the Board affirms the ALJ’s decision denying the additional temporary total disability benefits requested by claimant.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated July 17, 2002, is hereby affirmed.

IT IS SO ORDERED.

⁴ Claimant’s Brief at 6.

Dated this _____ day of December 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeff R. Elder, Attorney for Claimant
 Anton C. Anderson, Attorney for Respondent
 Bryce D. Benedict, Administrative Law Judge
 Director, Division of Workers Compensation